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August 23, 2019

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554

**Re: Crown Castle Fiber LLC v. Commonwealth Edison Company
Proceeding Number 19-170
Bureau ID Number EB-19-MD-005**

Ms. Dortch:

Pursuant to the Commission's June 25, 2019 Notice of Formal Complaint and 47 C.F.R. 1.729(e), Crown Castle Fiber LLC submits the attached Opposition To Respondent's Motion For Leave To Respond To Reply filed in the above-referenced proceeding.

Sincerely,

Davis Wright Tremaine LLP

A handwritten signature in blue ink, reading "Ryan Appel".

Ryan M. Appel

cc: Service List

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

CROWN CASTLE FIBER LLC,

Complainant,

v.

COMMONWEALTH EDISON COMPANY,

Respondent.

Proceeding Number 19-170

Bureau ID Number EB-19-MD-005

OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO RESPOND TO REPLY

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OPPOSITION TO RESPONDENT’S MOTION FOR LEAVE TO RESPOND TO REPLY

Crown Castle Fiber LLC (“Crown Castle”), by and through undersigned counsel, and pursuant to 47 C.F.R. § 1.729(e), opposes Respondent Commonwealth Edison Company’s (“ComEd”) Motion for Leave to Respond to Reply.

The Commission should deny ComEd’s request to respond Crown Castle’s Reply. Contrary to ComEd’s assertion, Crown Castle’s Reply *did not* make “several new allegations about important issues to which ComEd has had no opportunity to respond.”¹ In its Reply, Crown Castle identified or clarified facts and law that directly respond to assertions raised in ComEd’s Answer. Therefore, ComEd’s request to deviate from the pleading timeline prescribed in the Commission’s Rules has no basis.

While Crown Castle contends that no additional response from ComEd is appropriate, if the Commission grants ComEd leave to file a surreply, Crown Castle should be granted leave to file a response.

¹ Motion to Leave to Respond to Reply at 1.

I. COMED'S REQUEST FOR A SURREPLY IS PROHIBITED BY THE COMMISSION'S RULES

Under the Commission's pole attachment rules,² and the decisions announced thereunder, ComEd's Motion is unsupported and inconsistent with the Commission's established procedures for pole attachment complaint proceedings.

In enacting the Pole Attachment Act, Congress directed the Commission to "institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."³ Following this Congressional directive the Commission has held that "each party is responsible for submitting the appropriate data; it declines to file data at its own risk. . . . Except in unusual circumstances, we expect to resolve the issues using facts provided in the *authorized* filings."⁴

Fundamentally, ComEd is seeking to bolster its Answer, which was deficient, as Crown Castle demonstrated in its Reply. However, the mere fact that Crown Castle submitted facts and argument responding to ComEd's answer is not grounds for further pleading. The Commission's Rules contemplate that the complainant gets a complaint and a reply. The defendant gets only an answer. The Rules do not allow the defendant to get another bite at the apple and bolster its answer via a surreply.⁵

Critically, ComEd's Motion should be denied because under the Commission's rules Crown Castle, as the Complainant, is allowed to use its reply to submit facts and legal argument

² See 47 C.F.R. §§ 1.720–.740; .1401–.1415.

³ See S. Rep. No. 580, 95th Cong., 1st Sess. 21 (1978).

⁴ *Teleprompter of Fairmont, Inc. v. C&P Tel.*, 85 F.C.C.2d 243, 248 (1981) (emphasis added).

⁵ See, e.g., *Georgia Power Co. v. Teleport Communications Atlanta, Inc.*, 346 F.3d 1033, 1043–44 (11th Cir. 2003) (affirming FCC denial of pole owner's request for supplemental pleading, noting "FCC resolves pole attachment disputes according to a three-part pleading cycle").

that respond to ComEd's answer. Rule 1.728(a) states that the "reply shall contain statements of relevant, material facts and legal arguments that respond to the factual allegations and legal arguments made by the defendant."⁶ Thus, the mere introduction of facts or legal arguments in the Reply are not grounds for further pleading by ComEd. The Rule explicitly contemplates that the complainant will submit facts and legal argument in the reply in response to factual and legal assertions in the answer. As discussed below, that is all that Crown Castle did in the Reply.

Crown Castle did not introduce new claims that ComEd has not had an opportunity to answer.

II. THE ALLEGATIONS AND EXPLANATIONS IN CROWN CASTLE'S REPLY ARE NOT NEW AND ARE RESPONSIVE TO ISSUES RAISED IN COMED'S ANSWER

The following provides a point-by-point response to ComEd's assertions. For the Commission's convenience, Crown Castle quotes the relevant arguments from ComEd's Motion on each point.

COMED ASSERTION:

First, Crown Castle alleges for the first time in its Reply that "any" attachment that Crown Castle installs on ComEd's poles, including the wireless antennas Crown Castle installs but does not operate, are subject to federal Pole Attachment Act protections. This issue is thus similar to the "billboard" issue the Supreme Court declined to answer in *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002), and raises the additional question whether an attachment to be operated by another entity requires that other entity to file an attachment application. It is thus a critical issue of first impression for the Commission that requires full analysis.⁷

CROWN CASTLE RESPONSE:

Crown Castle's Reply did not make a new allegation regarding the application of Section 224 to its wireless node attachments and did not raise questions that amount to a "billboard"

⁶ 47 C.F.R. § 1.728(a).

⁷ Motion at 1-2.

issue. ComEd argued in the Answer that Crown Castle's antenna attachments are not protected under Section 224 and that the Commission's Rules because Crown Castle does not, itself, provide wireless services.⁸ In its Reply, Crown Castle responded to ComEd's assertion about the status of Crown Castle's antenna attachments by explaining that the definition of a pole attachment included "any" attachment by a provider of telecommunications service, and as a result, Crown Castle's antenna attachments are protected under Section 224 even if Crown Castle were not using the antennas to provide wireless service, itself.⁹ Moreover, Crown Castle emphasized that the antenna attachments are an integral part of its telecommunications offering, thus further demonstrating that the "wireless" equipment is a protected "pole attachment" under Section 224.¹⁰

Crown Castle's Reply was directly responsive to ComEd's legal and factual arguments. Crown Castle does not raise issues of attaching wholly unrelated equipment, nor does it raise any other issues that ComEd now tries to generate.

COMED ASSERTION:

Second, in response to issues raised by ComEd's Answer, the Reply for the first time fully explained Crown Castle's "RF transport service," and that explanation raises additional important issues to which ComEd has had no chance to respond. For example, although Crown Castle's Complaint suggested that Crown Castle was already using its wireless attachments to provide this RF transport service, the Reply states that Crown Castle only "plans to provide" RF transport service. Thus, all of the numerous antennas and other wireless attachments that are the subject to this Complaint proceeding apparently are not being used at this time to provide RF transport service or any service at all. Furthermore, while Crown Castle cites caselaw that it can provide service on a wholesale basis and still potentially qualify as a common carrier with attachment rights, Crown Castle fails to establish that it "holds [itself] out to service indifferently all

⁸ Answer at 2-6 (Aff. Def. ¶¶ 2-14).

⁹ Reply at 1-3, 24-26.

¹⁰ Reply at 21-26.

potential users,” which is the other common carriage prerequisite specified in this ruling. It is impossible to determine whether a service that is provided to a limited class of customers is a telecommunications service or a private carrier service offering without examining the contracts underlying Crown Castle’s offering of this service. Crown Castle’s RF transport service agreements with wireless carriers for dedicated connectivity between cell sites and switching centers appear to be private carrier arrangements, as Crown Castle has not posted its standard terms and conditions on a readily accessible public web site. ComEd intends to request further discovery to review Crown Castle’s agreements with the wireless carriers for these services and to review Crown Castle’s FCC Forms 499A filed with the Universal Service Administrative Company (USAC). In any event, ComEd has not had a chance to respond to the very important threshold issues raised by these new allegations.¹¹

CROWN CASTLE RESPONSE:

There is no legitimate issue regarding Crown Castle’s telecommunications services that justify a surreply. Crown Castle responded to ComEd’s arguments and allegations, which are without any factual support and entirely based on changing theories and speculations. Doing so did not raise “new allegations.” Instead, ComEd is continuing its meritless attempt to engage in a fishing expedition to raise questions about Crown Castle’s status as a telecommunications provider where there are none

Crown Castle did not make any new allegation in the Reply that justifies ComEd’s new arguments or requests. As set forth in response to ComEd’s motion for additional discovery, Crown Castle has established a *prima facie* case that it is a provider of telecommunications services.¹² This is a critical issue for the Commission to thwart. ComEd is attempting to create a collateral attack on Crown Castle’s status as a means to derail the Complaint. The Commission has rejected such attempts in the past and should emphasize now that such strategies will not be countenanced. As the Commission held in *Fiber Technologies*, “***attachers are entitled to rely on***

¹¹ Motion at 2-3.

¹² Complaint ¶ 3; Reply at 20.

decisions by responsible regulatory agencies, such as franchise authorities in the case of cable system attachers, and public utility commissions in the case of telecommunications carriers, in establishing their status as entities entitled to pole access under section 224(f) of the Act.”¹³

The same arguments that ComEd now seeks to perpetuate as grounds for further briefing were rejected as irrelevant by the Commission in past cases. For example, whether Crown Castle may provide some services on a private carriage basis is irrelevant, as the Commission recognized in the *Fiber Technologies* decision.¹⁴ Indeed, ComEd’s strategy is identical to the rejected strategy employed by the pole owner in *Fiber Techs. Networks v. N. Pittsburgh Tel. Co.* For example, in *Fiber Technologies*, the North Pittsburgh Telephone Company (“NPTC”) contended that Fibertech “must show that it is actually supplying telecommunications service to a customer in NPTC’s territory to qualify as a ‘telecommunications carrier’ with a with a right of attachment under section 224 of the Act.”¹⁵ The Commission rejected this assertion, holding that a “‘telecommunications carrier’ is a carrier that *offers to provide* telecommunications on a common carrier basis, regardless of whether the carrier has actually supplied such service to a

¹³ *Fiber Technologies Network, L.L.C. v. North Pittsburgh Tel. Co.*, 22 FCC Rcd. 3392 ¶ 15 (2007) (emphasis added); *see also MAW Communications, Inc. v. PPL Electric Utilities Corp.*, Memorandum Opinion and Order, EB Docket 19-29, EB-19-MD-001, ¶13 (Aug. 12, 2019) (complainant established as telecommunications provider based on CPCN and affidavit from executive); *Salsgiver Telecom, Inc. v. North Pittsburgh Telephone*, Memorandum Opinion and Order, 22 FCC Rcd 9285, 9289-91, ¶¶9-12 (EB 2007) (holding that the complainant established a *prima facie* case that it is a “telecommunications carrier” with pole attachment rights under section 224(f) by submitting a certificate of public convenience and necessity and tariffs); *Paragon Cable Television Inc. v. FCC*, 822 F.2d 152, 153-54 (D.C. Cir. 1987) (upholding the FCC’s “ruling that possession of a valid franchise is a reasonable pre-condition for pole attachment” and that it is appropriate for the FCC to “employ a presumption of validity with respect to the franchising authority’s actions vis-a-vis the franchise”).

¹⁴ *Id.* ¶16.

¹⁵ *Id.* ¶19.

customer in the past.”¹⁶ ComEd’s argument is indistinguishable from NPTC’s rejected argument. The Commission’s holding clearly demonstrates that the identification of Crown Castle’s customers and the production of agreements with said customers are irrelevant in determining a carrier’s regulatory status.

Indeed, ComEd’s strategy of asserting baseless allegations is illustrated perfectly in this part of the Motion. In its Answer, ComEd argued that Crown Castle has not filed a tariff with the Illinois Commerce Commission.¹⁷ In its Reply, Crown Castle explained that it previously had tariffs on file, but that under Illinois law, Crown Castle was allowed to and did withdraw its tariffs.¹⁸ Now, ComEd accuses Crown Castle of having failed to post its terms and conditions on a website, citing 47 C.F.R. § 42.10. However, 47 C.F.R. §42.10 applies only to *interstate* interexchange providers. Crown Castle has a Certificate to provide *intrastate* telecommunications services, and thus 47 C.F.R. § 42.10 is inapplicable. ComEd cites wholly inapplicable regulations in an attempt to create the appearance of an issue that does not exist.

In addition, Crown Castle did not “for the first time” describe its RF Transport service in the Reply. Crown Castle explained “RF transport service” in its Complaint.¹⁹ No greater discussion was required. Only because ComEd’s strategy is to challenge the “telecommunications” status of Crown Castle did Crown Castle provide further clarification in the Reply to respond to specific arguments by ComEd.²⁰

¹⁶ *Id.* (emphasis in original).

¹⁷ Answer at 6-10 (¶¶15 – 27).

¹⁸ Reply at 26.

¹⁹ Complaint ¶4.

²⁰ Reply at 20-26.

Moreover, ComEd states that it “has not had a chance to respond to the very important threshold issues raised by these new allegations.” Yet ComEd does not identify any new allegations that Crown Castle raised with respect to its RF Transport Service. Crown Castle provided further explanation but did not raise any new allegations.

Finally, ComEd’s argument emphasizes the significant stretch that ComEd is making. ComEd states that “[a]lthough Crown Castle’s Complaint suggested that Crown Castle was already using its wireless attachments to provide this RF transport service, the Reply states that Crown Castle only ‘plans to provide’ RF transport service.” ComEd is essentially making a mountain of a mole hill. Crown Castle clearly has been providing service using the fiber and wireless equipment attached to ComEd’s poles since as early as 2013, as ComEd recognizes the Complaint set forth.²¹ ComEd is attempting to take two words from the Reply, used in the context of discussing how Crown Castle’s antennas are an integral part of its network and service,²² to create an issue about whether Crown Castle actually provides service. This was, at most, a minor statement that did not further describe the fact that Crown Castle’s existing attachments are used to provide service because that was not the focus of discussion in that part of the Reply. Ultimately, ComEd’s issue is irrelevant. To qualify as a provider of telecommunications services, whose attachments are protected by Section 224, Crown Castle would need only to “offer” telecommunications services.²³ A telecommunications provider is not required to have current customers.

²¹ Complaint ¶¶25, 27-70.

²² Reply ¶¶ 42-47 (Proceeding 19-169); Reply ¶¶ 21-26 (Proceeding 19-170).

²³ 47 USC 153(53) (The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”); *see also Fiber Technologies Network*, 22 FCC Rcd. 3392, ¶ 19.

COMED ASSERTION:

Third, Crown Castle's Reply claims that for purposes of calculating a regulated wireless attachment rate: (1) only certain attachments located in the usable space on the pole should be counted; (2) "ancillary" equipment should not be counted; (3) space above the pole should not be counted; and apparently (4) necessary safety code clearances should not be counted. The only FCC decision the Reply cites to support its contentions is a 1985 Order addressing the Cable Rate, which was the only rate in effect at that time. The Cable Rate, unlike the Telecom Rate, apportions pole costs solely based on the amount of usable space that is occupied, which in the Commission's view rendered only usable space attachments meaningful. Cable attachments moreover include "ancillary" equipment only rarely, and only in the unusable space. Wireless attachments, on the other hand, include significant attachments of "ancillary" equipment on every single "node" pole with an antenna, and the "ancillary" antenna riser and power cables very often occupy the usable space on these poles. The Commission has never calculated a wireless attachment rate, so that the issue of which attachments to count for purposes of calculating the rate is a matter of first impression. Additional analysis of this issue is therefore warranted, including an analysis of how other jurisdictions like California have resolved this issue.²⁴

CROWN CASTLE RESPONSE: Crown Castle's Reply did not raise new issues. Rather, Crown Castle's Reply addressed the legal issues inherent in ComEd's Answer, but that ComEd chose not to address in its Answer.

In the Complaint, Crown Castle alleged that its wireless attachments occupy, at most, six feet of useable space on the poles.²⁵ In its Answer, without providing any support, ComEd contended that Crown Castle's facilities, which were illustrated in the diagram bates numbered CCF143, occupy "a total of approximately 35 feet," which almost equates to the entire height of the pole (40 feet) in the diagram.²⁶ ComEd also contended that Crown Castle's facilities

²⁴ Motion at 3-4.

²⁵ Complaint ¶¶ 62-69.

²⁶ Answer at 51-53.

illustrated in the exhibit bates numbered CCF124 add “up to far more than 3.48 feet.”²⁷

However, ComEd did not make any attempt to support these conclusions. Despite the fact that ComEd clearly was counting equipment in the unuseable space on the pole and even equipment that was not using any space on the pole, ComEd chose not to articulate the alleged legal justification for its assertions.

In response to ComEd’s meritless assertion, in its Reply, Crown Castle explained how its wireless node attachments occupy no more than 6 feet of useable space and presented FCC precedent to support its position that its calculation was appropriate and ComEd’s was not.²⁸ ComEd had the opportunity to present its occupied space argument in a thorough and detailed manner and missed that opportunity in its Answer. As noted above, the Commission has held that “each party is responsible for submitting the appropriate data; it declines to file data at its own risk. . . . Except in unusual circumstances, we expect to resolve the issues using facts provided in the *authorized* filings.”²⁹

COMED ASSERTION:

Fourth, the Reply for the first time provides calculations associated with ComEd’s so-called “appurtenances” and with its pole heights, which require additional scrutiny. For example, Crown Castle has used the wrong universe of poles to calculate the average pole height.³⁰

CROWN CASTLE RESPONSE: Crown Castle provided calculations for ComEd’s appurtenances and pole heights in its Reply because Crown Castle did not have this information when it drafted its Complaint. In addition, ComEd provides no basis for the assertion that Crown

²⁷ Answer at 51-53.

²⁸ Reply at 7-10.

²⁹ *Teleprompter of Fairmont, Inc. v. C&P Tel.*, 85 F.C.C.2d 243, 248 (1981) (emphasis added).

³⁰ Motion at 4.

Castle utilized the wrong universe of poles. Moreover, counsel for Crown Castle contacted counsel for ComEd to see if ComEd would provide the correct universe of poles and to discuss the possibility of reaching a stipulation on the appropriate appurtenance deduction and average pole height to be used in the pole attachment rate formula. As set forth in the parties supplemental Joint Statement, counsel for ComEd stated that “it might be willing to discuss stipulations following the usual filing process.” Thus, ComEd refused to discuss stipulations at this time and even as to the future said only that it “might” be will discuss stipulations.

COMED ASSERTION:

Fifth, Crown Castle’s Reply for the first time fully explains the connections between the entities that signed the three agreements at issue and complainant Crown Castle, and explains for the first time the authority these intermediate entities had through the years to provide services in Illinois. The Reply explained these connections only because ComEd’s Answer noted the numerous deficiencies in Crown Castle’s Complaint. ComEd should be entitled to respond to these new allegations, which should have been included in Crown Castle’s Complaint in the first place.³¹

CROWN CASTLE RESPONSE:

Crown Castle did not raise new allegations regarding its corporate structure; it provided additional explanation and clarification regarding Crown Castle’s connection to Sunesys, Inc., Sidera Networks, LLC, and NextG Networks of Illinois, Inc. in its Complaint.³² This detail was provided in response to assertions raised by ComEd in its Answer. Despite admitting that it has allowed Crown Castle to attach wireless and wireline attachments to poles for the past several years, in its Answer, ComEd now claims that it does not have a pole attachment agreement with Crown Castle, and that the companies did not provide notice of assignment of the pole

³¹ Motion at 4.

³² Reply pp. 26-37.

attachment agreements.³³ Crown Castle's Reply responded to that accusation by demonstrating that no assignment or transfer had ever occurred that required Crown Castle to provide notice to ComEd.³⁴

Ultimately, the fundamental issue was resolved in the Declaration of Rebecca Hussey, which was appended to Crown Castle's Complaint as Attachment A. Exhibit 6 of the Declaration are the Certificates of Authority issued to RCN New York Communications, LLC.³⁵ Exhibit 5 of the Declaration explicitly stated that Certificates of Service Authority "were granted in the name of RCN New York Communications, LLC, which changed its name to Sidera Networks, LLC, which subsequently changed its name to Lightower Fiber Networks II, LLC."³⁶ The Declaration further provided that "[t]he name of Lightower Fiber Networks II, LLC has been changed to Crown Castle Fiber LLC."³⁷ Accordingly, ComEd easily could have addressed this issue in its Answer.

III. CROWN CASTLE SHOULD BE PERMITTED TO FILE A RESPONSE IF COMED IS PERMITTED TO FILE A SURREPLY.

Crown Castle opposes ComEd's Motion because no further response is warranted by the circumstances and is prohibited by the Commission's Rules. The Commission's pole attachment complaint pleading timeline was created to provide the Complainant an opportunity to reply to

³³ Answer pp. 11-14 (¶¶ 28-32).

³⁴ Reply at 29-37.

³⁵ Complaint, Attachment A, Exhibit 6, CCF102 to CCF107.

³⁶ Complaint, Attachment A, Exhibit 5, CCF89.

³⁷ Complaint, Attachment A, Exhibit 5, CCF95.

allegations raised in the Answer.³⁸ Allegations made by Crown Castle in its Reply were in response to positions raised by ComEd in its Answer, as permitted by the FCC rules.³⁹

However, if Commission allows ComEd to file a surreply to Crown Castle's Reply, Crown Castle should be allowed to file a response to ComEd's surreply. Under the Commission's Rules, the complainant is entitled to the final reply. ComEd should not be allowed to circumvent the rules with its current request.

IV. CONCLUSION

Accordingly, the Commission should deny ComEd's Motion to Leave to Respond to Reply in Proceeding 19-170.

Respectfully submitted,

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Date submitted: August 23, 2019

³⁸ 47 C.F.R. § 1.728.

³⁹ *Id.*

RULE 1.721(m) VERIFICATION

I have read Complainant's Opposition to Motion for Leave to Respond to Reply filed by Crown Castle Fiber LLC on August 23, 2019 in the above-referenced proceeding. To the best of my knowledge, information, and belief formed after reasonable inquiry, the Opposition is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. The Opposition is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

Respectfully submitted,

/s/ T. Scott Thompson

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Date submitted: August 23, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2019, I caused a copy of the foregoing Opposition to Respondent's Motion for Leave to Respond to Reply to be served on the following (service method indicated):

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